Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

91-1728

No. _____

In The

Supreme Court of the United States

November Term, 1992

UNITED STATES OF AMERICA,

Respondent,

versus

JAMES E. WHITE,

Petitioner.

Petitioner for Writ of Certiorari To the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Counsel of Record:

MARK S. COHEN
Cohen and Dodge
Flatiron Bldg., Suite 325
1722 St. Mary's Ave.
Omaha, Nebraska 68102

Attorney for the Petitioner

JESSE O. IRVIN II #17321
Neighborhood Professional Bldg.
5224 North 24th Street
Omaha, Nebraska 68110-1360
(402) 453-6818

Attorney for the Petitioner

QUESTION PRESENTED

Should during the course of a Jury Trial a defendant be allowed to offer into evidence the IRS Tax Code or Sections of the Code to prove that because of conflicts in the Code it allows a person to conclude that filing an income tax return is voluntary and not mandatory and there are other alternatives for the IRS rather than criminal prosecution.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Citations to Opinion Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	10
Appendix	App. 1

TABLE OF AUTHORITIES

Cheeks vs. United States, 200 US. 32 .....

United States vs. Caudle, 606 F2d 451 (1979) .....

Bothke vs. Fluor Engineers and Construction Inc., 713 F2d 1405 (1983) .....

No. _____

In the Supreme Court of the United States
November Term, 1992

UNITED STATES OF AMERICA,

Respondent,

versus

JAMES E. WHITE,

Petitioner,

Petitioner for Writ of Certiorari
To the United States Court
of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, James E. White, prays that a Writ of Certiorari be issued to review the judgement of the United States Court of Appeals for the Eighth Circuit in this case.

CITATIONS TO OPINION BELOW

The opinions relevant to this case is United States v. White. No. (District of Nebraska, 1991).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgement on December 11, 1991. The petitioner sought a rehearing in that Court which was denied. He invokes this Court's jurisdiction, pursuant to 28 U.S.C. Section 41, 1291, and 1294(1) and Rule 4 of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions and statutes are 26 U.S.C. 6020 and 26 U.S.C. 7203.

STATEMENT OF THE CASE

The United States filed an information against the Defendant, James E. White, for failure to file a tax return for the years 1984, 1985, 1986, and 1987, in violation of title 26 United States Code Section 7203.

Petitioner entered a special appearance before the Magistrate to contest the District Courts jurisdiciton over the subject matter and the person of the Defendant, which the Magistrate overruled and ordered the Defendant to stand trial.

Defendent filed a motion to dismiss the charges against him based on the five year statute of limitations for Count No. 1 and for Count No. 2, for failure of the Internal Revenue Services failure to follow the rules as outlined in the IRS Code Book for dispute resolution. Counts three (3) and four (4) the Defendent argued were barred because the IRS failed to provide the forms for Defendant to file a tax return. The motions were overruled by the Magistrates findings of fact.

In making his findings the Magistrate concluded that 26 U.S.C. Section 6531(4) applied. Further, the Magistrate ruled that in effect the Regulations and Rules promulgated by the IRS are to be enforced against the tax payer but that the IRS is not required to follow its own rules and regulations.

During the trial witnesses for the Plaintiff were allowed to explain that the filing of a tax return was a voluntary act. Further, there was a witness who testified that he encouraged voluntary compliance. Further, Mr. David Stier testified for the Defendant and was attempting to settle the matter with the IRS. He testified that the Defendant was confused as to the Tax Code.

The Defense offered the IRS Code Book into evidence however, the trial judge refused to admit it into evidence ruling that it would be confusing to the jury.

The defense offered a section of the IRS Code which in effect states that if a Tax payer does not file a tax return the IRS may file for that tax payer and assess the amount due. The court would not allow this section into evidence.

Defendant was convicted and sentenced and at the time of sentencing the court stated that Defendant could have been confused but not that confused.

REASONS FOR GRANTING THE WRIT

This case involves a novel issue of law which has not previously been decided by this Court, but which should be resolved. Whether the IRS can refuse to follow regulations pomulgated by the agency and criminalize a tax payer for choosing not to commit a voluntary action and whether it is constitutional under the Fifth Amendment of the Constitution of the United States.

During the trial it was brought out that the Defendant, James E. White communicated with the IRS on a constant basis from the information on his W4 Form to the filing of an income tax form. For every form letter sent to the Defendant there was a response in writing. Each response answered the questions that the IRS posed to the Defendant with references to the applicable provision of the tax code. On numerous occasions the IRS sent the same form asking for the same information previously requested. The Defendant responded and sent copies of his last response.

During the trial the Plaintiff placed into evidence that part of the IRS Code that supposedly required a tax payer to file a tax return. The plaintiff also admitted that filing of a tax return was a voluntary act and one of their experts was the person who was in charge of voluntary compliance. On cross examination when asked whether he had ever spoke with the Defendant his response was no. On another occasion when asked had he ever met the Defendant his response was no. (see testimony of Paul Taylor, Volume II, page 277 lines 23 thru 25 and page 278 lines 1 thru 15).

The same witness explained that a part of his job was to encourage volunteer compliance however, when questioned about whether there had been an effort to discuss the matter with the Defendant or whether there had been to his knowledge an effort to discuss the matter with the defendant, his response was no. No one from the IRS except the Criminal Investigation Division had any real contact with the Defendant and their first remark to him after introduction was to give him his Miranda Warning.

The defense that was offered by the Defendant was that there was no intent to violate the IRS Code therefore, no criminal intent. To support the Defense's contention questions of witnesses were propounded to solicit information about which section of the Code took precedence. At one point during the trial the Plaintiff's expert testified about a phamplet which supplemented the IRS Code. When confronted about which took precedent the court interjected its own opinion as to which had the effect of the law (see Transcript, Volume II, page 270 lines 2 thru 25 and page 271 lines 1 thru 16).

Further, the defense attempted to offer into evidence the IRS Code Book to show how some articles conflict and to show from the experts the sections which conflict. The court overruled the proffer of the code into evidence (see trans. Volume II, page 283 lines 15 thru 35 and page 284 lines 1 thru 16). Because the total code was not allowed the defense offered Section 6020 into evidence, but the Court rejected this section and made its own interpretation what that Section meant and how it was to be construed (see trans. Volume II, page 284 lines 19 thru 25 and page 285, lines 1 thru 12). This should have been submitted to the jury for them to consider in their deliberations as to the intent of the Defendant in this matter.

Based on the rulings of the court as to what the court would allow into evidence the Defendant chose not to take the witness stand because he could not use the Code to support his point that he had no intent to violate the law. The only way the Defendant could prove lack of intent was to show by the Plaintiff's expert that the Code Book was the official in rules and regulations and this he could rely on the various section for the positions he had taken with respect to filing a tax return.

To prove his point the Defendant had to rely on an expert as his only witness. The testimony of Mr. David Stier, the income tax consultant who met with the Defendant in order to resolve the problem testified that he found the Defendant to be intelligent and hard working but as it pertained to the IRS Tax Code the Defendant was confused (see Volumn II, transcript, page 293 lines 1 thru 14).

This expert who had handled more than 1,000 cases was himself confused as to the manner that the IRS was handling this case. This attorney had done these things that he had done many times before to solve tax problems but no matter what he did the Defendant was branded a criminal and was going to be investigated (see Volumn II, transcript page 293 lines 12 thru 25 and page 294 lines 1 thru 25, page 295 lines 1 thru 25, page 296 lines 1 thru 25, and page 297 lines 1 thru 28.

The court when sentencing the Defendant concluded that the Defendant was intelligent and therefore, could not have been confused regarding filing a tax return (see Transcript, volumn III, page 346 lines 9 thru 17). None the less he would not allow the Code Book into evidence for the jury to determine whether one could get confused and therefore, negate intent.

Defendant motioned the trial court for an order of Acquittal on the grounds that the IRS had not followed their own regulations prior to the institution of this criminal action. Throughout the whole process with the IRS the Defendant maintained contact and asked questions and submitted information upon request. However the IRS refused to answer questions and at one point lost letters from the Defendant (see trans., page 93 lines 17 thru 25 and pages 94 lines 1 thru 10, also see trans. page 259 lines 7 thru 25).

It is clear from the testimony of the witnesses that the Defendant had communicated with the IRS but either his communications were ignored or misplaced without considerations. In Bothke v. Fluor Engineers and Constructions Inc. 713 F2d 1405 (1983), the Ninth Circuit considered the taking of wages of a tax payer who was contesting the amount claimed that was owed.

The court in reaching its decision states as follows:

> But the law reflects also congressioned determination that the tax payer should be afforded certain procedural rights which the IRS is bound to respect (see, eq Laing v. United States, 42 U.S. 161, 96 S.Ct. 473, 46 L. Ed2d 416 (1976). In balancing these interest congress has determined that violations of the procedural rights at issue here are exceptions to the Anti Injunction Act.

In the instant case all of the procedural rights have been violated and the defendant never given a chance to comply with any specific demands of the IRS.

The court in Bothke further concludes:

> The Service, with its broad authority including that of levying property, has power that is considerable, and in some ways unique, to disrupt taxpayers lives. The needs of the public first are vital, but the mere invocation cannot override all rights of the public from whom it exists without reference to the propriety of that invocation.

In the instant case the IRS ignored almost all of its other procedures except to force the Defendant to file a W-4 form for him the way they wanted it to be filed. Rather than answer some questions posed by the Defendant the IRS made a criminal out of the Defendant.

Bothke further stated that:

> For the condition precedent of the liability to be met, there must be a lawful assessment, either a voluntary one by the tax payer or one procedurally proper by the IRS. Because this country's income tax system is based on voluntary self assessment, rather than distraint, Flora v. United States, 362 U.S. 145, 176, 80 S.Ct., 630, 646-47, 4 L.Ed.2d 623 (1960), the Service may assess the tax only in certain circumstances and in conformity with proper procedures.

> Bothke believes that the IRS had to follow the deficiency proceedings of 26 U.S.C. Sec. 6212, 6213(a), under which he was entitled to a preassessment notice of deficiency which gave him 90 days to petition the Tax Court. Terry argues that the IRS was proceeding properly under an exception to the statutory requirement, whereby no deficiency notice is necessary if the amount assessed is the result of a mathematical or clerical error on the face of the return. Id Sec. 6213(b)(1), (g)(2).

Further in Bothke the court addresses the fact that Bothke was protesting what the IRS had assessed but the IRS failed to construe it as a protest. In the instant case the defendant was not protesting but questioning the regulations and the code book and trying to get a reconcilliation from the IRS. The court said in Bothke:

> More importantly, the statute does not require that the taxpayer put a legal classification on his protest. The Service, however, is with its expertise, is obliged to know its own governing statutes and to apply them realistically. Bothke's strongly worded protest should reasonably have been construed as a request for abatement. It seems the IRS proceeded illegally even under its interpretation of the proper procedure to use for his tax return.

Even the court when motioned for a dismissal did not read the materials submitted (see transcript, page 306 lines 21 thru 29). With all of the tools at the IRS' disposal it becomes apparent that the employees do not want to perform the tasks they are designed to perform. The expertise that should flow from the IRS turned into a witch hunt for those people who would question the code and request information. Even the expert in the instant case Paul Taylor testified that he was to foster voluntary compliance but in the instant case there never was an attempt to have the defendant volunteer to file a tax return that he was questioning (see trans., page 261 thru 263). There was never an assessment either voluntary or by the Service. The IRS only prepared a tax assessment form in preparation for this trial and the first time the defendant saw it was in the court room (see trans., page 102 lines 6 thru 25 and page 103 lines 1 thru 24).

CONCLUSION

The Defendant in the instant case is first and foremost an American as such subject to the constitution and the laws of the country he is also protected by the Constitution and the laws of this country.

The IRS is a branch of the Federal Government subject to the constitution and other laws of this country. The IRS is responsible for promulgating rules and regulations to collect taxes to support the Federal Government. As an administrative agency it is to formulate rules and regulations for itself as well as for the citizens of this country. The IRS should assist, negotiate, communicate and collect taxes. The enabling statute* provides for the above but does not provide for crimilization of a citizen.

The facts of this case are clear, that the Defendant maintained a constant communication with the IRS in every aspect of his tax status. Whenever the IRS requested information the Defendant responded. Whenever the Defendant requested information and referenced the IRS Code Book he was stonewalled. When he requested information about his exempt status the IRS sent him information on exemptions, when he suggested he was not required to file, the response was the same form letter that he originally responded to.

Throughout this trial the plaintiff's witnesses who testified from the IRS had some knowledge of the Defendant but only through his communication that he had sent to them. None could say that they met him or communicated with him in person. None had met him face to face. None had referred him to the tax resolution section of the IRS. No matter how hard the Defendant tried to show the IRS his position with respect to the code the IRS stonewalled and refused to answer his questions. In this case the IRS had used the regulations it has promulgated to support its position but the court has refused to allow the defendant to use some of those regulations to prove a lack of intent on his part to violate the law. The thing that has separated this country from Nazi Germany, Communist Russia and Facist Italy is that no branch of government has absolute power. However, one administrative agency has such power and that agency is the IRS. The IRS can criminalize any one it wants to under any conditions it wants, to include failure to comply with IRS regulations when the IRS has not followed its own regulations. The IRS has become to the United States what the Gistapo was to Nazi Germany and the Kremlin to the Soviet Union.

When one looks back over the decades of how the IRS has functioned it is clear that the tactic of fear and cohersin has been the main stay of its tactics. When one as the Defendant stands up and questions the IRS on its own rules and regulations the IRS criminalize him.

A German quote from the Nazi era is as follows: "When they came and got the foreigners I did not worry because I was not a foreigner, when they came and got the gypsy I did not worry because I was not a gypsy, when they came and got the jews I did not worry because I was not a jew, when they came and got me there was no one else left to worry. The Nuenberg trials of Nazi war criminals made it clear that blind obedience was not a difference to war crimes. The Defendant in the instant case refused to follow blindly and because of his refusal to become a criminal and because he questioned the Code he was not even allowed to use the code that made him a criminal.

In the instant case the IRS ignored its own regulations and came and got him. The defendant fought back as best he could with the weapons he had available to include the IRS Code Book. The court so far has been reluctant to accept the fact that one can follow the IRS Code with good faith and attempt to have the IRS follow its own rules. What provision of the constitution or any law of this country allows any administrative agency to criminalize the citizen because it does not follow its own regulations?

This case should be dismissed and the IRS forced to follow its regulations or in the alternative retried and the IRS Code Book be allowed into evidence so as to negate the intent element of this crime.

RESPECTFULLY SUBMITTED, this the

_____ day of March, 1992.

Mark S. Cohen
Cohen and Dodge
Flatiron Bldg., Suite 325
1722 St. Mary's Ave.
Omaha, Nebraska 68102

Attorney for the Petitioner

Jesse O. Irvin II #17321
Neighborhood Professional Bldg.
5224 North 24th Street
Omaha, Nebraska 68110-1360
(402) 453-6818

Attorney for the Petitioner

APPENDIX

A. Judgement, U.S. v. White, NO. 91-2304NEO (District of Nebraska 1991)

B. Order, dated 2/5/91, CR. 90-0-102

C. Magistrate's Findings and Recommendations, NO. CR. 90-0-102 (District of Nebraska 1990)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2304NEO	)	
UNITED STATES OF AMERICA, *Appellee,*	)	Appeal from the United States District Court for the District of Nebraska.
vs.	)	
JAMES E. WHITE, *Appellant*	)	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the District Court in this cause is affirmed in accordance with the opinion of this Court.

December 11, 1991

FOR PUBLICATION

IN THE UNITED STATES COURT FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR. 90-0-102
v.	)	ORDER
JAMES E. WHITE, *Defendant*	)	

This matter is before the Court on the findings and recommendations of the magistrate (Filing No. 16). Pursuant to the provisions of 28 U.S.C. § 636(b), the Court has conducted a *de novo* review of the findings and recommendations.

For the reasons stated by the magistrate in his memorandum in support of his findings and recommendations, the Court will adopt the findings and recommendations of the magistrate, deny the defendant's motion to dismiss and affirm the order of the magistrate. Accordingly,

IT IS ORDERED:

1) The findings and recommendations of the magistrate are adopted in full;

2) The defendant's motion to dismiss (Filing No. 11) is denied;

DATED this 5th day of February, 1991.

BY THE COURT:

LYLE E. STROM, Chief Judge
United States District Court

FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, *Plaintiff,*	)	CR. 90-0-102
vs.	)	**Magistrate's Findings and Recommendations**
JAMES E. WHITE, *Defendant*	)	

Presented to me is the motion to dismiss (Filing 11). I shall recommend to Chief Judge Strom that the motion be denied.

The defendant moves to dismiss the information in this case because he contends that the statute of limitations has run as to count I of the information. He also contends that the Internal Revenue Service (IRS) failed to follow its own rules for solving tax disputes, that the IRS did not provide defendant with a proper tax return, and that the IRS had not informed defendant of any tax liability. The defendant finally argues that he is not properly charged in counts III and IV because an improper section of the United States Code (USC) has been alleged. The criminal information in this case is predicated upon four alleged violations of 26 USC § 7203, which section proscribes, among other things, the willful failure to file income tax returns.

The defendant attacks count I because he claims the statute of limitations has run. Count I relates to the failure to file a tax return by April 15, 1985, for the calendar year 1984. The information in this case was filed August 27, 1990. The information was filed within the six-year statute of limitations which applied, measured form the required filing date of April 15, 1985. 26 USC § 6531(4). Accordingly, this portion of the defendant's argument must fail.

Defendant next contends that the IRS failed to follow its own rules for solving tax disputes and tax questions; that the IRS never provided him with the proper forms to file a tax return; and that the IRS had not informed defendant of any tax liability. Essentially, the defendant claims he lacked the intent to commit the crime. I believe the issue of intent is properly an issue for trial and is not capable of determination without trial of the general issue; therefore, pursuant to Fed. R. Crim. P. 12 the matter is not now properly raised. Fed. R. Crim. P. 12(b); 8 J. Moore, **Moore's Federal Practice §** 12.04[1] at 12-42 (2d ed. 1990). Accordingly, this prong of defendant's argument must fail.

Finally, defendant argues that, as to counts III and IV, he is being charged under the improper section of the United States code. The defendant provides me with no authority for his proposition, and he fails to brief the issue. Accordingly, I shall deem the issue abandoned. Local Rule of Practice 20.

IT IS RECOMMENDED to Chief Judge Strom that the motion to dismiss (Filing 11) be denied.

DATED this 13th day of December, 1990.

BY THE COURT:

Richard G. Kopf
United States Magistrate